



Paternalism, Hostility, and Concern for the Slippery Slope: Factors in Judicial Decision-Making When Religion and Regulation Collide

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**Paternalism, Hostility, and Concern for the Slippery Slope: Factors
in Judicial Decision-Making When Religion and Regulation Collide**
Supryia M. Ray

I. INTRODUCTION

Religion—and the demands religious doctrine imposes on the believer—has presented some of the most vexing issues of the last three decades. Various government agencies have brought their power to bear upon individuals asserting a Free Exercise right to undertake some practice that appears to conflict with prevailing law. When such conflicts occur, whether the agency institutes a criminal prosecution or is hauled into court by the claimant for denying a religious exemption, thorny constitutional issues inevitably arise. Courts must not only determine whether a claimant is *bona fide*—whether the claimant is sincere and truly making a *religious* claim—but they must also confront a host of claims posing direct conflict with various laws and regulations.

This paper will examine religious claims as they pertain to food and drug law issues, as exemplified by litigation surrounding 1) the Church of Scientology’s use of an instrument known as the Hubbard Electrometer, and 2) sacramental drug use. Individuals and groups alike have vigorously pursued and defended cases on both the state and federal level under the rubric of religious freedom when government action has impacted directly on asserted religious practices. In the 1960s and 1970s, the Food and Drug Administration (FDA) acted to end all use of an instrument known as the Hubbard Electrometer, used by practitioners of Dianetics and by adherents of the Church of Scientology, by instituting condemnation actions under the medical device provisions of the Food, Drug and Cosmetic Act of 1938;¹ the agency also sought to prevent the importation of such devices into the United States. Throughout the past three decades, various agencies charged with administering and enforcing drug laws (such as the Drug Enforcement Agency [DEA] and the Bureau of Narcotics and Dangerous Drugs [BNDD]) have prosecuted individuals for violating drug laws, and those who claim that their involvement with a given drug is religiously motivated or mandated have often fought back, most commonly by alleging a violation of Free Exercise, though they have made numerous other claims as well. Examples include Timothy Leary, Robert Boyll, a member of the Native American Church, and Judith Kuch, affiliated with the Neo-American Church. Numerous individuals (associated with groups such as the Native American Church, Native American Church of New York, Peyote Way Church of God, the Ethiopian Zion Coptic Church, and the Church of the Awakening) have also petitioned agencies such as the DEA for a religious exemption from drug laws, claiming sacramental drug use. Denial of such petitions has often resulted in litigation.

After providing an overview of a number of religious claims, agency actions, and the litigation that ensued, I will identify three motivating factors that recur in and affect judicial decision-making, as well as evaluate their impact on the outcome of various cases. I will argue that court decisions with respect to government action against Scientology and sacramental drug use are motivated primarily by one or more of the following factors: paternalism; hostility; and/or

¹21 U.S.C. 351-60.

fear of embarking upon a slippery slope.

II. OVERVIEW

In this section, I will discuss several cases decided during a period ranging roughly from the mid-1960s, when many drugs were criminalized on the federal level for the first time and when Scientology became a target of several government agencies, until the late 1980s, when the Supreme Court handed down a decision radically altering the tradition of Free Exercise jurisprudence established a quarter of a century earlier.

Let me begin, however, by explaining what type of case I will *not* address in this paper: cases in which a governmental ordinance, law, or regulation specifically targets a particular group because of its professed religious beliefs. Such overt examples of hostility and discrimination are rare, and in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court reiterated one of the few things that has long been clear in Free Exercise jurisprudence: non-neutral or non-generally applicable laws that burden religious practice are subject to the compelling interest test and will rarely withstand the rigorous scrutiny this test entails.² The *Lukumi* case involved an effort by the City of Hialeah to suppress ritual, religious animal sacrifice, the central element of the Santeria worship service;³ in 1987, the City passed a number of ordinances that, taken together, criminalized animal sacrifice,⁴ a practice that played a key role in a number of Santeria ceremonies; after such a ceremony, the animal would be cooked and eaten.⁵ Finding that the ordinances were neither neutral nor generally applicable—rather, they were gerrymandered with care to prescribe religious killings of animals but to exclude almost all secular killings and grossly under-inclusive, essentially burdening only Santeria religious practice and replete with exceptions for kosher slaughter, hunting, killing pests, and so forth—the court struck down the governmental action under the compelling interest test.⁶

Most cases are not as easy to decide as *Lukumi*, for they burden an asserted religious practice via the application of a facially neutral, generally applicable criminal law or regulation. Until the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1989),⁷ it was settled Free Exercise jurisprudence that the government must

²508 U.S. 520, 531 (1993). The compelling interest test requires that a law must be justified by a compelling government interest; furthermore, the law must be narrowly tailored to advance that interest in order to pass constitutional muster. *Id.* at 531.

³*Id.* at 534.

⁴*Id.* at 526-28.

⁵*Id.* at 524, 525.

⁶*Id.* at 542-46.

⁷494 U.S. 872 (1989).

justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.⁸ The compelling interest test was, in essence, a balancing test weighted toward the religious claimant; unless the government could demonstrate that the claimant was not making a bona fide religious claim or that accommodating that claim would significantly interfere with a compelling government interest, courts were, in theory, supposed to grant a religious exemption. *Smith* held that this compelling interest test, as set forth in *Sherbert v. Verner* (1963)⁹ and *Wisconsin v. Yoder* (1972),¹⁰ was not applicable to criminal laws that are both neutral and generally applicable;¹¹ in other words, the court held that, no matter how significant the burden on religious motivated conduct, the operation of neutral, generally applicable laws does not implicate Free Exercise concerns. As such, it radically altered Free Exercise jurisprudence.

I provide this summary of Free Exercise jurisprudence primarily to clarify a point of potential confusion: during the period with which I am primarily concerned—the mid-1960s to the late-1980s—courts faced with a neutral, generally applicable law that burdened religious practice were supposed to apply the compelling interest test, provided that a claimant was bona fide; of course, not all courts *did* use this standard in practice. *Smith* changed this rule, but *Smith* was itself legislatively overruled by Congress when it passed the Religious Freedom Restoration Act (RFRA) in 1993, restoring the compelling interest test as set forth in *Sherbert* and *Yoder*.¹² A challenge to RFRA is now before the Supreme Court. A discussion of the impact of *Smith* and RFRA is beyond the scope of this paper, which focuses on cases decided during the period of time between *Sherbert* and *Smith*.¹³

A. Scientology

A variety of government entities have come into conflict with the Church of Scientology. The Church has litigated issues involving its tax status,¹⁴ its solicitation practices, and its use of the Hubbard Electrometer (or E-meter, as it is more popularly called); various Church officials have even been

⁸*Id.* at 894 (O'Connor, J., concurring).

⁹374 U.S. 398 (1963).

¹⁰406 U.S. 205 (1972)

¹¹*Smith*, 494 U.S. at 878-79.

¹²Sec. 2(b), Pub. L. No. 103-141 (1993).

¹³An expansion of this paper might entail a discussion of how *Smith* affected judicial decision-making regarding cases similar to those discussed in this paper and an exploration of RFRA's impact on the conflict between religious claims and regulation of food and drugs.

¹⁴*See, e.g.,* Founding Church of Scientology v. United States, 412 F.2d 1197 (Ct.Cl. 1969). Individuals have

the target of criminal prosecutions. I will focus on the government's efforts to ban or otherwise restrict the use of the E-meter in the United States. The FDA has used the Food, Drug and Cosmetic Act (FD&C Act) to pursue two distinct lines of attack against the E-meter. First, the FDA instituted an action to condemn the E-meter, alleging that it was a medical device, misbranded in violation of the Act. The FDA contended that the E-meter lacked adequate directions for use and that its labeling made false and misleading claims for the treatment of disease regarding auditing, the process in which the instrument was used.¹⁵

The FDA contended that the E-meter qualified as a device,¹⁶ thereby bringing it within the scope of FDA regulation, a contention accepted by every court that has addressed the issue.¹⁷

The E-meter is used by Scientologists in a process called auditing, and it is generally considered essential to that process.¹⁸ It is a rather crude skin galvanometer, constructed of two tin soup cans hooked up to an electrical apparatus. An auditor asks the subject questions as he or she holds the cans, and the E-meter measures changes in the electrical resistance of that subject's skin. Auditors then use the rules and procedures set out in Scientology publications... [to] interpret the movements of the needle after certain prescribed questions are

also brought cases against the IRS for disallowing deductions taken as charitable contributions for payments made to the Church for auditing and training courses.

¹⁵*Founding Church of Scientology v. United States*, 409 F.2d 1146, 1161 (D.D.C. 1969).

¹⁶The Act defines device as
an instrument, apparatus, implement, machine...,
which is—....

(2) intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals...

and which does not achieve its primary intended purposes through chemical action within or upon the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.

21 U.S.C. 321(h).

¹⁷*United States of America v. An Article or Device... Hubbard Electrometer*, 333 F. Supp. 357, 360 (D.D.C. 1971) [hereinafter *Hubbard Electrometer*].

¹⁸*See, e.g., Founding Church of Scientology*, 409 F.2d at 1153.

asked, and... diagnos[es] the mental and spiritual condition of the subject.¹⁹ Generally, courts have recognized that the device is, *in and of itself*, harmless.²⁰

Auditing, although represented primarily as a method of improving the spiritual condition of man, also promises rather explicit benefits to bodily health.²¹ Auditing was first discussed in L. Ron Hubbard's best-selling book, *Dianetics*, in which he asserts that engrams, patterns imprinted upon the nervous system in moments of pain, stress or unconsciousness,²² cause and perpetuate a variety of mental and psychosomatic disorders.²³ Hubbard claimed that numerous ills, including arthritis, asthma, ulcers, and even cancer could be treated—and cured—via auditing.²⁴ Such health claims—and the use of auditing as an aid—however, are scattered throughout a number of books and pamphlets, and none were made on the labeling of the device itself; in fact, the device sported no labeling at all when the FDA brought its condemnation action.

The FDA argued that this literature, which was sold in the Distribution Center, a bookstore in the Church's basement that adjoined the Hubbard Guidance Center in which auditing was conducted and E-meters used, accompanied the E-meter and thus qualified as labeling for the device.²⁵ It further

¹⁹ *Id.*

²⁰ *See, e.g., Hubbard Electrometer*, 333 F. Supp. at 363.

²¹ *Founding Church of Scientology*, 409 F.2d at 1152.

²² *Id.*

²³ L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* 91-108 (1950).

²⁴ *Id.* at 92-93; the cancer claim appears in a later work, L. RON HUBBARD, *SCIENTOLOGY: A HISTORY OF MAN* 21 (4th ed. 1961). Scientology has existed both as a secular and religious movement. As a secular practice, it encompasses Dianetics, which is viewed as the branch particularly pertinent to mental health; as a religious practice, it accepts and incorporates all of Hubbard's teachings—his views, his writings, and his instructions—as authoritative. *See, e.g., Founding Church of Scientology v. United States*, 412 F.2d 1197, 1202 (Ct.Cl. 1969). Scientology as a secular practice co-existed with Scientology as a religious practice until Judge Gesell essentially outlawed secular use of the E-meter in *Hubbard Electrometer*.

²⁵ *Founding Church of Scientology*, 409 F.2d at 1152, 1149. Labeling is defined in 21 U.S.C. 321(m) as follows: The term 'labeling' means all labels and other written, printed, or graphic material matter (1) upon any article

alleged that the literature was false and misleading due to the health claims it contained. The Church admitted that the E-meter had no use in the diagnosis or treatment of disease as such but defended on the ground that its use of the device was protected by the Free Exercise Clause of the First Amendment.²⁶ It asserted that its use of the E-meter was religious in nature, designed to treat the human spirit; it also asserted a belief that the body can be affected via healing of the spirit.²⁷ After a jury trial, in which the district court allowed the jury to consider several pieces of Distribution Center literature, it condemned and ordered the destruction of E-meters and literature owned by the Church as well as individual adherents.²⁸

On appeal, the court, in a seminal opinion written by Judge Skelly Wright, found that at least some of the literature was improperly admitted because it qualified as religious doctrine. The court relied on *United States v. Ballard*²⁹ to establish the point that the First Amendment bars courts from assessing the truth or falsity of religious belief.³⁰ It then argued that if [the Church's] claims to religious status are accepted, a finding that the seized literature misrepresents the benefits from auditing is a finding that their religious doctrines are false. To construe the Food, Drug, and Cosmetic Act to permit such a finding would, in the light of *Ballard*, present the gravest constitutional difficulties.³¹ Having determined that the Church made out an un rebutted *prima facie* case for its status as a religion,³² the court specifically found that Literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine of Scientology and hence as a matter of law is not 'labeling' got the purposes of the Act.³³ Since the government had relied on much of this literature to establish misbranding, and since the court found that the literature was not 'labeling' within the meaning of the statute *as interpreted in the light of the First Amendment* (emphasis mine),³⁴ it reversed the district court.

Wright's opinion left open several avenues of attack, however—avenues that the FDA would use in its next action against the E-meter. Having emphasized that its holding prevents only a finding of false labeling on the basis of doctrinal religious literature and having left open the question of whether the

or any of its containers or wrappers, or (2) accompanying such article.

²⁶*Founding Church of Scientology*, 409 F.2d at 1154, 1148.

²⁷*Id.* at 1154.

²⁸*Id.* at 1148.

²⁹322 U.S. 78 (1944).

³⁰*Founding Church of Scientology*, 409 F.2d at 1156.

³¹*Id.* at 1156-57.

³²*Id.* at 1160.

³³*Id.* at 1161.

³⁴*Id.* at 1148-49.

E-meter lacked adequate directions for use,³⁵ the FDA was sure to take another shot. Even more damning was the court's per curiam clarifying observations in response to the government's petition for rehearing, which stated that in order to raise a religious defense to a charge of false statement (here misbranding), the person charged with the alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, scientific, or otherwise secular claims.³⁶

In *United States of America v. An Article or Device... Hubbard Electrometer*,³⁷ the FDA once again sought nationwide condemnation of the E-meter on the theory that it was misbranded and lacking adequate directions for use.³⁸ This time, it was more successful. Judge Gesell entered a decree of condemnation essentially eliminating all secular use of the E-meter,³⁹ but due to First Amendment concerns felt forced to permit the Church and others who base their use upon religious belief... to continue auditing practices upon specified conditions which allow the Food and Drug Administration as little discretion as possible to interfere in future activities of the religion.⁴⁰ The court would have required the following warning on every E-meter and every piece of literature mentioning the device:

The E-meter is a device which has been condemned by Order of a Federal Court for misrepresentation and misbranding, in violation

³⁵*Id.* at 1162.

³⁶*Id.* at 1164.

³⁷333 F. Supp. 357 (D.D.C. 1971) [hereinafter *Hubbard Electrometer*].

³⁸*Hubbard Electrometer*, 333 F. Supp. at 358-59.

³⁹Remember that although Dianeticists and Scientologists used the E-meter, only the latter is a religious organization. Hubbard introduced Dianetics in a 1950 article published in a magazine entitled ASTOUNDING SCIENCE FICTION; furthermore, the article described Dianetics as a new science. *See Founding Church of Scientology v. United States*, 412 F.2d 1197, 1198 (Ct.Cl. 1969). He did not create the Founding Church of Scientology (D.C.) until 1955, but the Church has essentially incorporated all of Hubbard's writings, including those relating to Dianetics. The D.C. Church's Certificate of Incorporation states that its purpose is [t]o act as a parent church for the propagation of the religious faith known as 'Scientology,' and to act as a Church for the religious worship of that Faith. *Id.* at 1198.

⁴⁰*Hubbard Electrometer*, 333 F. Supp. at 364.

of the Federal Food, Drug, and Cosmetic Act. Use of the E-meter is permitted only as part of bona-fide religious activity. The E-meter is not medically or scientifically useful for the diagnosis, treatment, or prevention of disease. It is not medically or scientifically capable of improving the health or bodily functions of anyone. Any person using, selling, or distributing the E-meter is forbidden by law to represent, state or imply that the E-meter is useful in the diagnosis, treatment, or prevention of any disease.⁴¹

Yet another appeal followed. The D.C. Circuit affirmed the district court's decision but concluded that its Order would invoke the Government and the courts in an excessive entanglement with religion and so limited the written warning to the third and fourth sentences of the original Order, though it retained the requirement that the E-meter could be sold or distributed only for use in bona fide religious counseling.⁴²

In arriving at his decision, Gesell made use of the opening offered to him by the court in its clarifying observations occasioned by the government's petition for rehearing. Given the tenor of Wright's opinion, which, despite its openings, emphasized that religious claims were as a matter of law immune from judicial scrutiny and stated that the theory of auditing constituted such a claim, you might think that Gesell would feel constrained in his examination of Scientology literature. To the contrary. Citing the per curiam observation regarding the requirement that the person charged must have explicitly held himself out as making *religious* claims in order to mount a religious defense, the court abruptly concluded that The bulk of the material is replete with false medical and scientific claims devoid of any religious overlay or reference.... Viewed as a whole, the thrust of the writings is secular, not religious. The writings are labeling within the meaning of the Act. Thus the E-meter is misbranded and its secular use must be condemned along with secular use of the offensive literature as labeling.⁴³

Gesell did, however, recognize that the First Amendment was implicated in the case: Where there is belief in a scientific fraud there is nonetheless an interference with the religion that entertains that belief if its writings are censored or suppressed. Similarly, if a church uses a machine harmless in itself to aid its ministers in communicating with adherents, the destruction of that machine intrudes on religion.⁴⁴ As such, he eliminated secular but not religious use of the machine, setting conditions on the latter, as evidenced by his Order.

Having only partially succeeded in ending use of the E-meter through its attempt to condemn the device nationwide, the FDA next attempted to ban its import. And thanks to the elastic language of the FD&C Act's provisions pertaining to import,⁴⁵ it succeeded. In two cases, *Church of Scientology of Cal-*

⁴¹1969-1974 FDLI Jud. Rec. 90 (D.D.C. 1971).

⁴²1969-1974 FDLI Jud. Rec. 131 (D.C. Cir. 1973).

⁴³*Hubbard Electrometer*, 333 F. Supp. at 361-62.

⁴⁴*Id.* at 363.

⁴⁵21 U.S.C. 381(a)(3) permits the Secretary of Health

*ifornia v. Richardson*⁴⁶ and *Church of Scientology of Minnesota v. Department of Health, Education and Welfare*,⁴⁷ the FDA detained and refused admission to E-meters imported from the United Kingdom into the United States on the ground that the devices were misbranded for lack of adequate instructions as to their use, and both courts accepted this theory. The devices in both cases bore a disclamatory label stating that the E-meter was not intended or effective for the diagnosis, treatment, or prevention of any disease.⁴⁸ Both courts emphasized these labels were not sufficient to comply with the FD&C Act's requirements, in that they did not provide directions for use. Both courts also reasoned that they could consider the health claims made in Scientology literature without having to assess their truth or falsity, an act forbidden by *Ballard*; having set forth therapeutic uses of the E-meter in its literature, the courts found, the E-meters were bound by the FD&C Act's directional provisions.⁴⁹

The Church also attempted to defend on the ground that directions for use were simply unnecessary (and hence the branding provisions inapplicable), given that the E-meter was harmless in and of itself.⁵⁰ In *Church of Scientology of California*, the court went to some pains to argue that the device *does* pose a danger in the possibility that ignorant and gullible persons are likely to rely upon them instead of seeking professional advice for conditions they are

and Human Services (at the time of these cases, the Secretary of Health, Education and Welfare) to refuse admittance to and then destroy any article that appears to be misbranded, except as provided in subsection (b), which provides so weak a check that it is no check at all. Subsection (b) states that final determination regarding an item's admission may be deferred if it appears to the Secretary that such item can be relabeled to achieve compliance with the FD&C Act. In such a situation, the Secretary may authorize such relabeling, subject to departmental supervision.

⁴⁶437 F.2d 214, 568 (9th Cir. 1971).

⁴⁷341 F. Supp. 563, 566 (D. Minn. 1971), *aff'd on the basis of* District Court Judge Nordbye's opinion, 459 F.2d 1044 (8th Cir. 1972).

⁴⁸*Church of Scientology of California*, 437 F.2d at 218; *Church of Scientology of Minnesota*, 341 F. Supp. at 563-64.

⁴⁹*Church of Scientology of California*, 437 F.2d at 218; *Church of Scientology of Minnesota*, 341 F. Supp. at 658-59.

⁵⁰*Church of Scientology of California*, 437 F.2d at 217.

represented to relieve or prevent.⁵¹ In this way, it could deny the Church the exemption that the misbranding provisions of the FD&C Act would otherwise require.⁵² The court in *Church of Scientology of Minnesota*, which generally relies heavily on its California counterpart, agreed.⁵³

B. Sacramental drug use

Major conflict between anti-drug laws and religious claims to sacramental or otherwise religiously-oriented drug use dates back to the 1960s, when federal legislation regulating many drugs, especially hallucinogenic drugs, was passed for the first time. The FDA has had authority to regulate such hallucinogenic drugs under the authority of the FD&C Act,⁵⁴ but the DEA now administers and enforces federal anti-drug legislation.

Leary v. United States, a 1967 case in which Dr. Timothy Leary, a well-known and respected scholar, challenged his convictions pertaining to marijuana on Free Exercise grounds,⁵⁵ is perhaps the first major federal case to face this conflict, but in the thirty years since the *Leary* decision, debate has continued, perhaps most passionately regarding sacramental use of peyote.

1. Peyote

Peyote is a plant with psychedelic, hallucinogenic properties that has been used for centuries in religious ceremonies and as an aid to attaining some type of visionary or spiritual state. Until Congress passed the Drug Abuse Control Amendments of 1965,⁵⁶ the use of peyote, as well as numerous other psychedelic substances, was perfectly legal on the federal level, though illegal in

⁵¹*Id.* at 217 (citing *Drown v. United States*, 198 F.2d 999, 1006 (9th Cir. 1952)).

⁵²21 U.S.C. 352(f) provides that the Secretary of Health and Human Services shall promulgate regulations exempting such drug or device from such requirement if adequate directions for use are not necessary for the protection of public health.

⁵³*Church of Scientology of Minnesota*, 341 F. Supp. at 568.

⁵⁴21 U.S.C. 301 *et seq.*

⁵⁵383 F.2d 851, 853 (5th Cir. 1967).

⁵⁶79 Stat. 226 @3(a); these Amendments were subsequently superseded by the Controlled Substances Act, 21 U.S.C. 801-904, but the regulation of peyote was carried forward, as well as the exemption granted to members of the Native American Church for use of peyote in bona fide religious ceremonies.

some states. When the federal legislation was passed, peyote was classified as a Schedule I substance,⁵⁷ which means that it was deemed to have a substantial and detrimental effect on the health and general welfare of the American people.⁵⁸ Furthermore, all Schedule I substances have been found to have a high potential for abuse, no currently accepted medical use, and a lack of accepted safety for use, even under supervision.⁵⁹ Only one exception to the peyote ban exists. A DEA regulation, entitled Special Exempt Persons, specifically exempts peyote use by NAC members in the context of bona fide religious ceremonies; the exemption reads as follows:

The listing of peyote as a controlled substance under Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church are exempt from registration.⁶⁰

Promulgated in tandem with the 1965 Amendments, the exemption was carried over into the Controlled Substances Act and still exists today.

As initially passed by the House of Representatives, the Drug Abuse Control Amendments of 1965 specifically exempted peyote used in connection with the ceremonies of a bona fide religious organization from control.⁶¹ The Senate, however, deleted this provision, preferring an administrative determination of which drugs would be brought under the bill's control, subject to prescribed standards.⁶² In response to concerns raised about the impact of the Senate amendment on religious practices, Congressman Harris, Chairman of the House Committee on Interstate and Foreign Affairs, stated that:

Two decisions have been rendered in this area in recent years.... Both these cases held that prosecution for the use of peyote in connection with religious ceremonies was a violation of the first amendment to the Constitution.

In view of all this, I requested the views of the Food and Drug Administration and have been assured that the bill, even without the peyote exemption appearing in the House-passed bill, cannot forbid bona fide religious use of peyote.⁶³

⁵⁷Schedule I(c)(12), 21 U.S.C. 812(c).

⁵⁸21 U.S.C. 801(2).

⁵⁹21 U.S.C. 812(b)(1).

⁶⁰21 C.F.R. 1307.31. About half of the states have similar exemptions, whether created by statute or judicial decision. *See United States v. Boyll*, 774 F. Supp. 1333, 1338 (D.N.M. 1991).

⁶¹H.R. 2, 11 Cong. Rec. 14608 (1965); *see also* NAC of NY at 1249.

⁶²S.Rep.No.89-337, *quoted at* 111 Cong. Rec. 14609 (1965).

⁶³111 Cong. Rec. 15977 (1965).

FDA's letter to Congressman Harris stated that

If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H.R. 2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.⁶⁴

The bill, as amended by the Senate, promptly passed the House, and regulatory exemption for the NAC ensued; five years later, Congress revised the narcotics laws in the Controlled Substances Act of 1970. During hearings on the Act, Congressman Satterfield questioned Mr. Sonnenreich, an official of the BNDD, about the status of the regulatory exemption for the NAC. Sonnenreich replied, We consider the Native American Church to be *sui generis*. The history and tradition of the church is such that there is no question but that they regard peyote as a deity as it were, and we will continue the exemption.... Under the existing law originally the Congress was going to write in a specific exemption but it was then decided that it would be handled by regulation and we intend to do it the same way under this law.⁶⁵

Various Native American tribes have traditionally used peyote, and the drug has played a central role in the religion known as Peyotism. To members of the Native American Church, a peyotist religion, peyote is more than a sacrament.... Peyote is, itself, considered a deity which cannot be owned by any individual. Peyote is worshipped and eaten at a religious ceremony called a peyote meeting.... It is considered sacrilegious to use peyote for nonreligious purposes.⁶⁶ At the time the federal legislation was passed, the Native American Church was certainly the most well known, if not the only, recognized peyotist religion, but since then, a number of religious groups have claimed that they, too, regard peyote as a sacrament. As the war on drugs has become an increasingly high priority in the federal government, conflict between peyotists claiming a right to use peyote under the Free Exercise Clause and government agencies attempting to enforce the anti-drug laws has intensified.

Perhaps the most well-known early case discussing the conflict between religious claims to peyote use and legislation outlawing the plant is *People v.*

⁶⁴111 Cong. Rec. 15977-78 (1965). At this time, the FDA was charged with drug enforcement, a role now delegated to the DEA.

⁶⁵Drug Abuse Control Amendments of 1970, hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2d Sess. 117-18 (1970).

⁶⁶*United States v. Boyll*, 774 F. Supp. 1333, 1335 (D.N.M. 1991).

Woody, in which a Navajo Indian challenged his state conviction for unauthorized possession of peyote.⁶⁷ The California Supreme Court reversed Woody's conviction, applying the compelling interest test delineated in *Sherbert*. The court held that use of peyote in bona fide pursuit of religious faith outweighs and does not frustrate any compelling state interest in a peyote ban.⁶⁸

Following *Woody* and the passage of the Drug Abuse Control Amendments of 1965, however, groups and individuals claiming a religious right to use peyote have, in general, fared poorly. Members of the Native American Church (NAC) are among the very few claimants to have successfully avoided conviction under anti-peyote laws and to have petitioned the government for an exemption from such laws. This is not surprisingly given that the NAC is the only church that is expressly exempted from the operation of the federal anti-peyote law.

One recent case exhibits a particularly passionate defense of religious freedom. In *United States v. Boyll*, a non-Native member of the NAC was charged with importing peyote into the United States after making a religious pilgrimage to Mexico to obtain the plant.⁶⁹ The court found Boyll's profession of belief in the tenets of the NAC to be bona fide.⁷⁰ The United States argued that Boyll could not be a member of the NAC—and thus could not call on the exemption for protection—because neither he nor his spouse was 25% Native American, as required for membership by the NAC.⁷¹ Boyll presented both scholarly and lay testimony to prove that non-Natives have in fact been admitted to the Church and that only one branch of the NAC, the NAC of North America, is known to restrict membership to Native Americans.⁷² Calling the governments argument a racially restrictive reading of the federal exemption, the court applied the compelling interest test and ruled for Boyll, finding that no compelling interest even existed in this case given the very existence of an exemption for members of the NAC.⁷³ In fact, the court argued that the exemption actually explicitly establishes a governmental interest in preserving the exemption for peyote as a controlled substance for its ritual use by Indian and non-Indian members of the Native American Church, especially given that the exemption does not, on its face, restrict NAC membership to Natives (though some state statutes have) nor did Congress ever distinguish between Native and non-Native members.⁷⁴ The court seemed to view the government's attempt to impose a racial restriction to membership in a religious organization as an excessive entanglement with religion.⁷⁵

⁶⁷61 Cal.2d 716, 717 (1964).

⁶⁸*Woody*, 61 Cal.2d at 717.

⁶⁹774 F. Supp. 1333, 1335 (D.N.M. 1991).

⁷⁰*Id.* at 1337.

⁷¹*Id.* at 1335.

⁷²*Id.* at 1336.

⁷³*Id.* at 1335, 1341-42.

⁷⁴*Id.* at 1342, 1338.

⁷⁵*Id.* at 1340.

A number of other religious groups have also petitioned agencies such as DEA for extension of the NAC peyote exemption to cover their members, but no such petition has been granted. Foremost among these groups is the Peyote Way Church of God (Peyote Way), though groups that use other hallucinogenic drugs have also tried to mount similar challenges. Peyote Way has repeatedly petitioned the DEA for an exemption akin to the one afforded the NAC. Peyote Way was founded by Immanuel Trujillo, previously a member of the Native American Church.⁷⁶ Members of Peyote Way, like those of the NAC, regard peyote as a sacrament and a deity, and courts have generally accepted their profession of belief as bona fide.⁷⁷

In *Peyote Way Church of God v. Smith*, after DEA denied its petition for an exemption for sacramental peyote use, Peyote Way challenged both the federal NAC peyote exemption and a parallel exemption granted by the State of Texas.⁷⁸ Rather than applying the compelling interest test, which would seem to be mandated by *Sherbert*, the court argued that different treatment of groups who profess a belief in the sacramental use of peyote was fine as long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians.⁷⁹ The court then found that the preference is reasonable and rationally designed to further Indian self-government, and granted summary judgment to the defendants.⁸⁰

Peyote Way appealed the case to the Fifth Circuit. On appeal, the court reversed the district court's entry of summary judgment, arguing that the very existence of these exemptions negated the existence of a compelling governmental interest, particularly given that the government failed to present evidence of peyote's negative effects on religious users and failed to explain why it couldn't monitor the peyote use of a 200-member group when it monitored the 250,000-member NAC without apparent difficulty.⁸¹ The court then remanded for additional evidence and findings sufficient to evaluate the plaintiff's Equal

⁷⁶698 F. Supp. 1342, 1344 (N.D. Tex. 1988).

⁷⁷*See, e.g., id.*

⁷⁸566 F. Supp. 632, 636, 635 (N.D. Tex. 1983) [hereinafter *Peyote Way I*], *rev'd*, *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984) [hereinafter *Peyote Way II*]; the exemptions differ materially only in that Texas specifies that the exemption granted to members of the Native American Church under this section does not apply to a member with less than 25% Indian blood. Sec.4.11(a), Art. 4476-15, Vernon's Ann.Civ.Stat. The federal exemption contains no such specification and refers only to members of the Native American Church.

⁷⁹*Peyote Way I*, 566 F. Supp. at 638.

⁸⁰*Id.*

⁸¹*Peyote Way II*, 742 F.2d at 201. Given that the Fifth

Protection claim.⁸²

Back in the district court, the case became *Peyote Way Church of God v. Meese*.⁸³ Using the *Sherbert* compelling interest test, the court concluded that plaintiffs' Free Exercise claim should yield to the governmental interest of regulating the use of substances found to be harmful to the public at large.⁸⁴ This time around, the court treated the federal exemption as a grandfather clause, arguing that Congress specifically exempted the NAC from the application of the Controlled Substances Act because Native Americans used peyote in the context of religious ceremonies before Congress first determined that regulating psychotropic drugs was necessary to the general welfare.⁸⁵ The court also cited the American Indian Religious Freedom Restoration Act as support for the special status accorded to Native Americans.⁸⁶ In short, the court seems to argue that Congress intended to exempt the NAC—and only the NAC; since *Peyote Way* lacks this Congressional stamp of approval, the exemption was properly denied.

Once again, *Peyote Way* appealed to the Fifth Circuit, but by the time its case was decided, the Supreme Court's radical *Smith* decision had been handed down and RFRA has not yet been passed, so the court could no longer use the *Sherbert* compelling interest test to evaluate Free Exercise claims against neutral laws of general applicability.⁸⁷ This time around, the court explicitly argued that the exemption for the NAC qualified as a political classification appropriate to Native American cultural preservation.⁸⁸ The court reasoned that since *Peyote Way* was not similarly situated to the NAC in terms of Congress-

Circuit explicitly referenced compelling interest test, it is probably safe to say that it found the district court's invocation of rationality improper.

⁸²*Id.* at 202.

⁸³698 F. Supp. 1342 (N.D. Tex. 1988) [hereinafter *Peyote Way III*].

⁸⁴*Id.* at 1346.

⁸⁵*Id.*

⁸⁶*Id.* at 1348.

⁸⁷*Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991) [hereinafter *Peyote Way IV*]. Note that the court would have had to apply the compelling interest test, even given the *Smith* decision, if it had found that the exemption constituted a racial classification; however, it ruled that the classification was political rather than racial, *id.* at 1215, and so a rational basis test could be applied.

⁸⁸*Id.* at 1215.

sional concern for cultural preservation, no denial of equal protection existed.⁸⁹ The court also made short work of Peyote way's claim that the NAC peyote exemption created an establishment of religion. Noting the Native Americans' special status as sovereign nations, existing in a unique guardian-ward relationship with the United States, the court argued that the regulation properly singled out one religion—the NAC—because the NAC is the only tribal native American organization of which the government is aware that uses peyote in bona fide religious ceremonies.⁹⁰

Only two cases appear to be outliers, so to speak. In *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, the Church of the Awakening petitioned the Bureau to amend the regulation containing the NAC peyote exemption to include the Church by expressly adding it to the exemption.⁹¹ The Church challenged the regulatory exemption as creating an arbitrary classification in violation of Fifth Amendment due process, and the government conceded that the Church was bona fide.⁹² Although the court conceded that Native Americans historically have been classified differently from non-Natives and assumed (without deciding) that peyote use was more important to the former, it deemed the classification arbitrary, an offense to substantive due process, because neither distinction set forth by the government was rationally related to the interest that the regulation was designed to serve: the protection of human health.⁹³ The court refused to find for the petitioners, however, because it concluded that their proposal—adding their own church name to the exemption—suffered from the same constitutional infirmity.⁹⁴

The other oddball is *Native American Church of New York v. United States*, in which the court ruled that the peyote exemption was equally available to the plaintiff, the Native American Church of New York, if in fact it is a bona fide religious organization and would make use of peyote for sacramental purposes and regard the drug as a deity.⁹⁵ The Church's name implies that it is associated with the NAC, but this is not in fact the case. The NAC of New York was founded by Alan Birnbaum in 1976, few of its members are Native Americans, and the church is not affiliated with the NAC in any way.⁹⁶ The Church claimed that it views not just peyote but all psychedelic drugs as deities, and accordingly it petitioned the DEA to exempt all use of psychedelics provided

⁸⁹*Id.* at 1214.

⁹⁰*Id.* at 1217; the court did acknowledge that a challenge by another Native American peyotist organization could conceivably succeed. *Id.* at 1216.

⁹¹459 F.2d 415, 415 (9th Cir. 1972).

⁹²*Id.* at 416.

⁹³*Id.* at 416-17.

⁹⁴*Id.* at 417.

⁹⁵468 F. Supp. 1247, 1251 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 205 (2d Cir. 1980).

⁹⁶*Id.* at 1248.

that they are central to the existence of the Church and used in bona fide religious ceremonies.⁹⁷ The DEA promptly denied the petition, and the court did rule for the DEA on all substances except for peyote, given the Congressional determination of the dangerous, uncontrollable, and medically useless character of Schedule I substances.⁹⁸

However, presumably because of the exemption for NAC members from the peyote provisions, the court examined the NAC of New York's attempt to obtain a peyote exemption much more closely. The court cited a fair amount of legislative history, including the statements by Congressman Harris and Mr. Satterfield mentioned previously.⁹⁹ The court reasoned, as follows, that the peyote exemption did not per se exclude groups other than the NAC:

Plainly the Church [NAC] was *sui generis* because it was the only religious organization then in existence that regarded peyote as a deity. Mr. Sonnenreich's statement did not foreclose the exemption to other religious organizations later established that also regard peyote as a deity, as the plaintiff, the Native American Church of New York, claims to do.¹⁰⁰

Hence, the court concluded that the plaintiff need only prove that it was bona fide and that it regarded peyote in the same light as the NAC to qualify for the exemption.

2. Marijuana and LSD

A number of groups and individuals have sought to obtain an exemption for their use of marijuana and/or LSD. Like the peyotists, many of these groups have attacked unsuccessfully the NAC peyote exemption. The Ethiopian Zion Coptic Church is perhaps the litigious of these groups, but I will first discuss Timothy Leary and the Neo-American Church, since they were among the first to raise the issue of the NAC peyote exemption.

In *Leary v. United States*, Dr. Timothy Leary, as well-respected scholar who had turned his academic focus to the exploration of religious experience stemming from the use of psychedelics,¹⁰¹ was convicted of various federal counts involving marijuana; Leary defended on the ground that he used the drug as a sacramental aid to his practice of Hinduism.¹⁰² Despite the fact that the court found that Leary's use of marijuana was not essential to his religion¹⁰³ and deemed his religious defense insufficient and immaterial to the validity of his convictions,¹⁰⁴ it nevertheless engaged in a discussion of his religious claims, concluding that the protection of society constituted a paramount government

⁹⁷ *Id.*.

⁹⁸ *Id.* at 1248-49.

⁹⁹ *Id.* at 1249-51.

¹⁰⁰ *Id.* at 1251.

¹⁰¹ 383 F.2d 851, 857 (5th Cir. 1967).

¹⁰² *Id.* at 853.

¹⁰³ *Id.* at 860.

¹⁰⁴ *Id.* at 863.

interest that precluded recognition of Leary's asserted religious right to use marijuana.¹⁰⁵

In *United States v. Kuch*, Judith Kuch, an ordained minister of the Neo-American Church, raised a Free Exercise claim as a defense to her indictment on marijuana and LSD charges stemming from both the Marihuana Tax Act of 1937 and the FD&C Act.¹⁰⁶ The court rejected the claim, holding that the Neo-American Church was not a religion. The court wrote that While there may be and probably are some members of the Neo-American Church who have had mystical and even religious experiences from the use of psychedelic drugs, there is little evidence in this record to support the view that the Church and its members as a body are motivated by or associated because of any common religious concern.... It is clear that the desire to use drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence.¹⁰⁷ The court then went on to hold that, even if the Church *was* a religion, it would still lose. Invoking a rational basis test,¹⁰⁸ the court nevertheless analyzed the problem in a manner that recalls the compelling interest test, which would have been the proper mode of analysis under *Sherbert*. The court found that the public interest was paramount, citing a concern for the breakdown of society¹⁰⁹—the court associated marijuana with health hazards, addiction, and crime, and it associated LSD with even greater health hazards¹¹⁰—and for the further spread of drug usage, given the Church's lax membership policy.¹¹¹

The court also rejected Kuch's Equal Protection claim, which asserted, as all such claims have, that the Church should be entitled to the same exemption as the NAC.¹¹² The court first addressed marijuana, which it noted was covered by the Marihuana Tax Act rather than the FD&C Act, and pointed out that only the latter makes any provision for religious exemption.¹¹³ Furthermore, unlike for the NAC's use of peyote, Congress did not delegate to FDA the opportunity to exempt a substance; rather, Congress itself determined that marijuana was to be tightly controlled due to its health hazards.¹¹⁴ The court then made short work of the claim for LSD, simply commenting that the Church had never applied for an exemption from the FD&C Act for its use of

¹⁰⁵*Id.* at 860.

¹⁰⁶288 F. Supp. 439, 442 (D.D.C. 1968). The Marihuana Tax Act is found at 50 Stat. 551, as amended, Int.Rev.Code of 1954, 26 U.S.C. 4741-76.

¹⁰⁷*Kuch*, 288 F. Supp. at 444.

¹⁰⁸*Id.* at 452.

¹⁰⁹*Id.* at 445.

¹¹⁰*Id.* at 445, 448.

¹¹¹*Id.* at 447.

¹¹²*Id.*

¹¹³*Id.* at 450.

¹¹⁴*Id.* at 451.

the drug.¹¹⁵

Members of the Ethiopian Zion Coptic Church claim that their use of marijuana is sacramental, and that church doctrine obligates them to smoke it continually all day, through church services, through everything we do.¹¹⁶ In *United States v. Middleton*, Middleton, a member of the Church, was convicted of importing and possession marijuana.¹¹⁷ The court promptly rejected his argument that the original Congressional classification of marijuana as a Schedule I substance was unreasonable and held that reclassification upon new evidence was a matter for legislative judgment.¹¹⁸ Using the compelling interest test, the court held that the government interest in regulating and controlling the distribution and use of marijuana outweighed claims of religious use, even in prayer services.¹¹⁹

In a more recent case, *Olsen v. Drug Enforcement Administration*, Carl Olsen, another member of the Church, unsuccessfully sought a religious exemption from the DEA for his use of marijuana.¹²⁰ Despite several distinguishing factors from *Middleton*—Olsen formulated a restrictive use proposal, and DEA conceded that the Church was bona fide, its use of marijuana sacramental—the agency denied the exemption in a letter ruling.¹²¹ DEA argued that the immensity of the marijuana abuse problem made for a compelling governmental interest in controlling marijuana trafficking that outweighed the Church’s asserted religious interest.¹²² DEA also asserted that it had no authority to promulgate an exemption for any other church than the NAC and implied that the Director of the BNDD properly granted the NAC exemption only in reliance on Congressional intent in the legislative history of the Controlled Substances Act.¹²³ The court rejected the DEA’s assertion of lack of authority, holding that Establishment Clause questions would arise if the DEA lacked power to permit any other church to qualify.¹²⁴

¹¹⁵*Id.* at 450.

¹¹⁶*Olsen v. Drug Enforcement Administration*, 878 F.2d 1458, 1459 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 906 (1990).

¹¹⁷690 F. 2d 820, 821 (11th Cir. 1982).

¹¹⁸*Id.* at 823.

¹¹⁹*Id.* at 824.

¹²⁰*Olsen*, 878 F.2d at 1459.

¹²¹April 22, 1986 letter ruling from John Lawn, DEA Administrator, to Carl Olsen [hereinafter Letter Ruling]. *See id.* The DEA’s Final Order (July 26, 1988) [hereinafter Final Order] is quoted in full in *Olsen* at 1465-1468.

¹²²Letter Ruling. *See id.* at 1459.

¹²³Final Order. *See id.* at 1466.

¹²⁴*Id.* at 1461.

Nevertheless, the court ruled against Olsen on both his Free Exercise and Establishment Clause challenges. Apparently invoking the compelling interest test, the court ruled that accommodating the Church's religious use of marijuana was not possible without unduly burdening or disrupting enforcement of the federal marijuana laws. Given that the tenets of the Church endorse marijuana use every day throughout the day, the court reasoned that Olsen's proposal for confined use would not be self-enforcing. It is hardly unreasonable to forecast a large monitoring burden in light of the church's history, which suggests that children would have easy access to marijuana and that few checks would exist to prevent distribution to nonbelievers.¹²⁵ The court then rejected Olsen's Establishment Clause challenge, rejecting his contention that the Church was similarly situated to the NAC for purposes of exemption.¹²⁶ Accepting DEA's contention that [T]he actual abuse and availability of marijuana in the United States is many times more pervasive... than that of peyote, the court explicitly rested its decision on the immensity of the marijuana control problem.¹²⁷ Despite this ruling, however, the court discussed additional distinguishing factors. It noted that the NAC's peyote use is limited to a traditional, precisely circumscribed ritual, whereas the Church teaches that marijuana is rightly smoked all day.¹²⁸ Furthermore, the court found that the peyote exemption is bound up with the federal policy of preserving Native American culture, and thus can be comprehended properly only '[i]n light of the *sui generis* legal status of American Indians.'¹²⁹

III. JUDICIAL MOTIVATION

In this section, I will argue that court decisions with respect to government action against Scientology and sacramental drug use are motivated primarily by one or more of the following factors: paternalism; hostility; and/or the fear of embarking upon a slippery slope. Questions of trust recur in each of these motives (or, alternatively, concerns). Paternalism typically involves one of the following two questions for courts: 1) Do we, as decision makers in society, trust the group or individual not to fool others?; and 2) Do we trust groups and individuals not to harm themselves? Hostility often belies another question of trust: Do we trust groups and individuals not to fool the government, which includes the courts? The question is not merely whether courts believe claimants are bona fide but whether courts believe they can accurately judge the sincerity of these claimants. The third factor, the slippery slope, can be viewed from two very distinct perspectives, one of which views the claimant's demands as the source of a host of problems and the other of which views the government as unduly restricting individual freedom and religious liberty. Both perspectives

¹²⁵ *Id.* at 1462.

¹²⁶ *Id.* at 1463.

¹²⁷ *Id.* at 1463, 1464.

¹²⁸ *Id.* at 1464.

¹²⁹ *Id.* at 1464.

implicate questions of trust, but directed toward different actors. Those taking the first perspective ask whether the groups to whom we grant religious license, so to speak, will keep that license limited. The more self-contained a group is, the more isolated from the mainstream of society, the more it limits its membership and that membership's access to the item at issue, the more likely we are to recognize and protect a religious interest. A special concern for cultural preservation of some longstanding, but relatively small and culturally distinct group, may also influence a court's decision toward granting protection of the religious interest. Furthermore, the fear that granting an exemption for one religious group will open the floodgates for an untold number of me, too's may also influence a court's decision. Those taking the second perspective evince a lack of trust in the government, fearing that it will override constitutional mandates in an effort to combat social problems such as drug abuse.

A. Paternalism

A common concern manifested by courts who must decide how to resolve the conflict between an asserted religious interest and a governmental law or regulation is the same concern that they identify as a compelling or at least important governmental objective: protection of the public. Furthermore, concern for the public—specifically, public health—underlies both the FD&C Act¹³⁰ and the Controlled Substances Act, along with the Drug Abuse Control Amendments of 1965 and 1970. Not surprisingly, courts who identify this concern are predisposed to rule in favor of the government rather than the religious claimant. They seem to be concerned with two questions. First, can we trust the claimant not to fool others? Second, when must we prevent an individual from engaging in a seemingly useless or even dangerous practice?

The Scientology opinions pertaining to importation of E-meters provide particularly strong examples of judicial paternalism. Both courts rejected the argument made by the Church that it need not label its E-meters with adequate directions for use because it fell within what one might term the harmlessness exemption of the statute.¹³¹ Both courts, although implicitly admitting that the device was not itself directly harmful, vigorously argued that the device cannot be considered truly harmless because of the possibility that ignorant and gullible persons are likely to rely upon them instead of seeking professional advice for conditions they are represented to relieve or prevent.¹³² Clearly, both courts feared that people might—misguidedly, they presumed—seek

¹³⁰*See, e.g., United States v. An Article or Device... Hubbard Electrometer*, 333 F. Supp. 357, 361 (D.D.C. 1971) (stating that The Food and Drug laws are designed to protect the public.) [hereinafter *Hubbard Electrometer*].

¹³¹21 U.S.C. 352(f).

¹³²*Church of Scientology of California v. Richardson*, 437

out diagnosis or treatment via E-meter rather than by going to a real doctor. Taken together with both courts' rejection of disclamatory labels that quite clearly disavowed any claim that the E-meter effectively could be used for the diagnosis, treatment, or prevention of any disease—labels that any reasonable person would understand—the courts' decisions manifest a desire to save people from themselves, especially those few ignorant and gullible persons who do not know better. Furthermore, the courts' ultimate ruling that the E-meters could be banned from import due to a lack of adequate labeling only strengthens the case for their paternalistic motives. By the time these cases were decided, E-meters were manufactured in the United States as well as the United Kingdom,¹³³ so it was not as if banning their importation would have prevented further proliferation and use of E-meters in the United States. More likely, the courts saw their decision as just one more way to manifest their disapproval of a device they viewed as lacking any therapeutic value.

The very contention that a device, when used as a *religious* aid, can and must bear adequate directions for use is in and of itself a questionable—even bizarre—proposition. If the FDA permitted the device to be used for secular purposes—which it does and need not do, according to *United States v. An Article or Device*—then, like every other FDA-regulated medical device, it makes perfect sense to require labeling. After all, such devices have been adjudged by FDA to have some scientific basis, and providing explanatory instructions should not be difficult. But how does one explain how to use a device that admittedly has no scientific basis? Gesell clearly barred the Church from making any claims that the device has medical or scientific value in the diagnosis, treatment, or prevention of disease. What, then, could the Church have written on its label, whether directed at the subject or auditor? Hold one tin can in each hand and answer the questions posed to you by the auditor? Have the subject hold one tin can in each hand; pose a series of questions as per Scientology publications and procedures. This seems downright silly, and it really does not explain how to use the device except in the most formalistic of ways. It certainly doesn't indicate how the device works—nor can it, given the religious belief underpinning its use and utility. As such, any holding that the E-meters at issue in these proceedings should be barred from import for a lack of adequate instructions seems empty and unremediable.

Such a rationale also seems to conflict with Gesell's order that the Church and others who base their use upon religious belief will be allowed to continue auditing practices upon specified conditions which allow the Food and Drug Administration as little discretion as possible to interfere in future activ-

F.2d 214, 217 (9th Cir. 1971) (citing *Drown v. United States*, 198 F.2d 999, 1006 (9th Cir. 1952).

¹³³*Church of Scientology of Minnesota v. Department of Health, Education and Welfare*, 341 F. Supp. 563, 564 (D. Minn. 1971).

ities of the religion.¹³⁴ Since the Food and Drug laws are designed to protect the public, Gesell wrote, the recourse afforded to the FDA must be the narrowest possible remedy to achieve the legitimate non-religious end, which in this case is only to protect the public against misrepresentation since the E-meter is harmless in itself.¹³⁵ The import decisions permit the very interference and overbroad remedy that Gesell's order was designed to avoid, and they do so in a sweeping manner by allowing a bar on import of devices intended solely for religious use. The import provisions of the FD&C Act represent the ultimate in administrative discretion since they permit the Secretary of HHS to deny import merely if a device appears to be misbranded.¹³⁶ Given the distinction made between use of the E-meter for secular and religious purposes,¹³⁷ the import decisions not only resist—even ignore—the implicit command that the FDA should not interfere with religious use of the E-meter, but these decisions also impinge directly on the availability of a key, legally-permitted element of religious practice.

Any number of sacramental drug use decisions cite the preservation of public health and the need to protect the public from becoming addicted to drugs or from being victimized by other addicted to drugs as motivating factors in their decision-making. In *Leary v. United States*, the court identified a paramount government interest in the protection of society.¹³⁸ The court rationalized its denial of an exemption largely on the basis that young people in particular might succumb to the siren-like lure of drug use. The court wrote, The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, 'turn on,' is the 'in' thing.... We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.¹³⁹ *United States v. Kuch* contains a virtually identical statement characterizing the public interest [as] paramount;¹⁴⁰ citing various authorities to prove that marijuana and LSD were both serious health hazards, the court also noted that marijuana was associated with addiction and crime.¹⁴¹

Court decisions pertaining to the Ethiopian Zion Coptic Church ex-

¹³⁴*Hubbard Electrometer*, 333 F. Supp. at 364.

¹³⁵*Id.* at 361, 363.

¹³⁶21 U.S.C. 381(a)(3).

¹³⁷Secular use was banned, but religious use was merely restricted in a way geared to ensure that the public would not be fooled into believing the E-meter had some medical or scientific value.

¹³⁸383 F.2d 851, 860 (5th Cir. 1967).

¹³⁹*Id.* at 861.

¹⁴⁰*United States v. Kuch*, 28 F. Supp. 439, 445 (D.D.C. 1968).

¹⁴¹*Id.* at 445-48.

press similar concern. In *United States v. Middleton*, for instance, the court emphasized the fact that Congress has strongly and clearly expressed its intent to protect the public from the obvious danger of drugs and drug traffic.¹⁴² Even the court in *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, which was not particularly disposed toward the government's position, found the government interest to be protection of health.¹⁴³ The court, however, argued that this interest was not actually related to the existence of an exemption permitting *only* the NAC to sacramentally use peyote.¹⁴⁴ Most courts approach the question of whether a single exemption for the NAC is constitutional differently than the *Kennedy* court, however, implicitly arguing that the NAC's *sui generis* legal status obviates the need to consider whether the government's interest in protecting the public is relevant to that exemption. Hence as long as courts find that the government's interest in public health and welfare is related to the statute at issue and that granting an exemption would substantially undermine that statute, they will typically deny the exemption.

Courts may also manifest paternalism in reference to those who are *already* members of a particular group. In essence, courts in these cases are asking whether we trust groups and individuals not to harm themselves. Witness the government's argument in *People v. Woody*, one of the early cases of this nature. The Attorney General of California contended that since peyote could be regarded as a symbol, one that obstructs enlightenment and shackles the Indian to primitive conditions, the state had the responsibility to eliminate its use.¹⁴⁵ Today, in this era of political correctness, no government would be likely to make such an argument—at least explicitly—but its assertion thirty years ago reminds us that such concerns do surface. And what more paternalistic, even condescending reasoning could there be? To its credit, the court in *Woody* rejected the government's argument outright, but it is not so hard to imagine its implicit acceptance in a context less prominent than that of Native American religion, especially given the prevalence of paternalism toward society generally. Few court decisions today, in a time when autonomy is applauded, overtly evince such paternalistic concerns, but they may be more hidden than nonexistent.

Not all courts, of course, are paternalistic. Some are decidedly anti-paternalistic, even inclined to glorify individual freedom, and courts taking this view are among the few to decide consistently in favor of the religious claimant, providing, of course, that the court believes the claimant to be bona fide. *Woody* is one such example. In rejecting the Attorney's General's paternalistic argument, the court flatly stated that We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance

¹⁴²*United States v. Middleton*, 690 F.2d 820, 824 (11th Cir. 1982).

¹⁴³*Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 416 (9th Cir. 1972).

¹⁴⁴*Id.* at 417.

¹⁴⁵*People v. Woody*, 61 Cal.2d 716, 723 (1964).

of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition'.¹⁴⁶ *United States v. Boyll*, which will be discussed at length in the section on The slippery slope, provides another example. The tenor of the opinion is illustrated by the opening lines of Judge Burciaga's opinion: There is a genius to our Constitution. Its genius is that it speaks to the freedoms of the individual.... The Government's 'war on drugs' has become a wildfire that threatens to consume those fundamental rights of the individual deliberately enshrined in our Constitution.¹⁴⁷ While concern for the fundamental rights of the individual meshes easily with an anti-paternalistic stance, it seems to be more strongly related to the slippery slope concern that the government has been diluting constitutional protections over the course of the last several years, undermining not only individual freedom but also the very foundation of our democratic society.

While paternalism commonly appears in judicial decision and certainly influences the outcome of cases, it does not usually appear to be a decisive factor. With the exception of the Scientology import decisions, every other opinion discussed in this section—paternalistic and antipaternalistic—also contemplates a slippery slope; the manner in which the court conceives of the slippery conception appears to serve as the linchpin of its decision-making.

B. Hostility

A court's hostility to a religious claimant—or, conversely, its embrace of that claimant—also plays a key role in its decision-making. The main element determining how a court views the claimant seems to be whether it trusts the claimant not to fool the government, especially the courts. This question really has two components. First, and most important, is whether the court believes that the claimant is sincere and presents a bona fide religious claim. Second is a court's confidence in its own ability to make this determination.

Courts have been especially harsh with and hostile toward Scientology, more so than toward most of the sacramental drug use cases discussed in this paper. Few of them have been willing to accord Scientology all-around religious status.¹⁴⁸ Both Gesell and Wright, in *United States v. An Article or Device* and *Founding Church of Scientology v. United States*, respectively, formally refused to decide that Scientology was a bona fide religion. Rather, both held that the

¹⁴⁶*Id.*

¹⁴⁷*United States v. Boyll*, 774 F. Supp. 1333, 1334 (D.N.M. 1991).

¹⁴⁸In fact, courts have consistently denied the Church exemption from the federal income tax, *Founding Church of Scientology v. United States*, 412 F.2d 1197, 1199 (Ct. Cl. 1969), and have denied its members deductions for payments made to the Church for auditing or training services and claimed as charitable contributions.

Church had made out a *prima facie* case for religious status that the government had failed to rebut.¹⁴⁹ Both then explicitly noted that the government might have made such an effort, thereby implying that had the government chosen this course, it might well have succeeded. Wright's opinion, arguably the most neutral of the Scientology opinions discussed in this paper, specifically stated that We do not hold that the Founding Church is for all legal purposes a religion. Any *prima facie* case made out for religious status is subject to contradiction.¹⁵⁰ The court's per curiam opinion on rehearing went even further: The Government up to this time, including its motion for rehearing, has not challenged the *bona fides* of appellants claim of religion. In the even of a new trial, as indicated in the panel opinion, it would be open to the Government to make this challenge.¹⁵¹ The court in *Church of Scientology of California v. Richardson* even declined to consider the Church's alleged religious use of the E-meter, deeming it irrelevant.¹⁵² Had the court believed that the Church was bona fide, it seems likely that the court would have given more consideration to the impact of the FDA's detention of E-meters slated for import.

Gesell's opinion is a particularly interesting one in that hostility toward Scientology pervades his opinion, and yet he ultimately felt constrained to permit continued use of the device in a religious context. Gesell's comment regarding the government's request that all E-meters be forfeited and destroyed is telling: However desirable this may be in the public interest, the Court is without power to so order in view of... the First Amendment.¹⁵³ Furthermore, he regarded this entire litigation negatively: Unfortunately the Government did not move to stop the practice of Scientology and a related 'science' known as Dianetics when those activities first appeared.... Had it done so, this tedious litigation would not have been necessary.¹⁵⁴ Much of what drives this hostil-

¹⁴⁹*Hubbard Electrometer*, 333 F. Supp. at 360; *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1162 (D.C. Cir. 1969).

¹⁵⁰*Founding Church of Scientology*, 409 F.2d at 1162.

¹⁵¹*Id.* at 1165. The government did not, in fact, rise to this challenge upon retrial, a fact which Gesell appears to lament in commenting that no evidence to the contrary was offered by the Government on the second trial. Accordingly, *for purposes of this particular case only*, claimant must be deemed to have met its burden of establishing First Amendment standing (emphasis mine). *Hubbard Electrometer*, 333 F. Supp. at 360.

¹⁵²*Church of Scientology of California v. Richardson*, 437 F.2d 214, 217 (9th Cir. 1971).

¹⁵³*Hubbard Electrometer*, 333 F. Supp. at 365.

¹⁵⁴*Id.* at 359.

ity appears to be disbelief that Scientology is a bona fide religion, and Gesell's comments often become flatly disparaging. Gesell calls Hubbard a facile, prolific author whose quackery flourished.¹⁵⁵ He refers to Scientology literature as skillful propaganda designed to make Scientology and E-meter auditing attractive in many varied, often inconsistent wrappings.¹⁵⁶ You get the sense that Gesell feels impelled to swallow a bitter pill in permitting continued religious use of the E-meter: he will do it, but he will not be happy about it.

There is probably some basis for the intuition of many courts that Scientology is not a bona fide religion—or at least that it was not at its inception, even if it now has genuine adherents. Hubbard did not set up Scientology as a *religious* organization until five years after he first published his first article pertaining to Dianetics, and he represented Dianetics as a science.¹⁵⁷ The very title of his first major work in the area was *Dianetics: The Science of Mental Health*.¹⁵⁸ Only after espousing Dianetics as a science did he begin to incorporate its theories, including the theory of auditing, into a religious structure. In one of its own publications, the Church states that Scientology is going all out as a religion. The religious aspect is highly functional, very true and is very—much—more successful.... The public expects to have ministers around.... If you don't like religion for heaven's sake call yourself a Dianeticist.¹⁵⁹ Does any religion actually state that it is going all out as a religion? If it is a religion, what else could it go all out as?, a judge might legitimately ask. The comments about the movement's success as a religion and public expectations also seem at odds with our concept of what constitutes a religion. Some of Scientology's early adherents even seem to have regarded the move toward formal religious organization as an attempt to provide a legal cloak for the movement's activities.¹⁶⁰ Furthermore, Scientology is money-oriented. Church doctrine holds that you must always give something back for what you receive. This doctrine is not in and of itself unusual, but the Church's pay-for-services application of the doctrine is—and this aspect probably spurs more skepticism about whether the Church is bona fide than anything else. Many judges have commented on the cost aspect of Scientology. Wright, for instance, documented a cost of \$500 for 25 hours of auditing and noted that E-meters cost \$125 apiece¹⁶¹; Gesell added that the state of clear was guaranteed for \$5000.¹⁶² How often does a church guarantee spiritual or any other type of well-being for a monetary price?

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* notes 24, 39.

¹⁵⁸ See *supra* note 23.

¹⁵⁹ Church of Scientology statement in issue 14 of its periodical ABILITY, quoted in *Hubbard Electrometer*, 333 F. Supp. at 362.

¹⁶⁰ *Founding Church of Scientology*, 409 F.2d at 1152.

¹⁶¹ *Id.* at 1152, 1153.

¹⁶² *Hubbard Electrometer*, 333 F. Supp. at 362.

Nevertheless, a large number of Scientology temples now exists, and the movement has spread worldwide. Even if the movement was originally converted into a religion to attain more favorable tax status, in an effort to take advantage of the heightened protection afforded religion in the United States, or even because Hubbard could make more money under the guise of religion than science, certainly now the movement must have genuine adherents. It is hard to imagine that John Travolta or Tom Cruise, for instance, are in it for the money. Dishonest leaders do not a religion make, but it's hard to say that where a sincere following exists, dishonest leaders render a movement nonreligious. Most of the televangelists' congregations would be afforded no protection were this the case!

Interestingly, Judge Gesell also wrote the opinion in *United States v. Kuch*. Here, too, his hostility seemed to stem from his belief that the Neo-American Church, incorporated as a nonprofit organization in 1965, was not bona fide.¹⁶³ Gesell referred to the Church as an alleged religion and characterized its membership as mocking established institutions, playing with words, and totally irreverent.¹⁶⁴ He cited as examples of this irreverence and insincerity the Church's official songs (Puff, the Magic Dragon and Row, Row, Row Your Boat) and its symbol (a three-eyed toad), and he wrote that its 'Catechism and Handbook' is full of goofy nonsense, contradictions, and irreverent expressions.¹⁶⁵ Having painted this absurd picture of the Church, Gesell had no difficulty concluding that it was not a bona fide religion;¹⁶⁶ although he recognized that the Church had made a conscious effort to assert in passing the attributes of a religion, he concluded that this effort was made obviously only for tactical purposes.¹⁶⁷

Proving that a religion is bona fide is no easy task. Groups like the Peyote Way Church of God and Scientology, for instance, both of which can probably make the strongest arguments for recognition of their bona fide religious belief, at least at this point in time, cannot point to an entrenched historical tradition in this country, unlike the Amish or the NAC. Not surprisingly, courts seem inclined to question those things with which they lack familiarity. Although making out a *prima facie* case does not present substantial obstacles—in *Founding Church of Scientology v. United States*, Wright identified the existence of ministers licensed as such, with legal authority to marry and bury, as well as fundamental writings containing a general account of man and his nature comparable to those of recognized religions as sufficient to establish the *prima facie* case¹⁶⁸—if the government challenges a group's claim to be a

¹⁶³*United States v. Kuch*, 28 F. Supp. 439, 443 (D.D.C. 1968).

¹⁶⁴*Id.* at 444.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 445.

¹⁶⁸*Founding Church of Scientology*, 409 F.2d at 1160.

religion, meeting that burden of proof may not be easy. Nascent groups do not have the historical advantage of the Amish, the Mormons, or the Jehovah's Witnesses, for instance, all of whom enjoy an unquestioned acceptance of the sincerity of their religious beliefs, even when courts find those beliefs bizarre or even unacceptable. Given that many of the groups discussed in this paper sprung up around the 1960s—a time in which societal concern regarding the use of psychedelic drugs grew rapidly—or later, and that some of them—such as the Neo-American Church—truly *were* fronts for drug use, any claimant making a non-established religious claim will face skepticism.

The second issue of trust that may arise for courts is whether they believe they can judge a claimant's sincerity accurately. When a court doubts its ability to determine sincerity one way or another, it seems inclined to rule against the religious claimant. It appears that courts taking this position will often assume, without deciding, that a claimant is bona fide and then go on to deny his or her claim under either a compelling interest test or some version of a rational basis test. When a court is convinced that it has accurately assessed a claimant's asserted religious motivation as a sham, it easily rules against that claimant, as in *Kuch*, *supra*; in such a case, the court need never engage in weighing the conflicting claims, for it can simply rule that the claimant is not bona fide in his or her asserted religious motivation, mooted the First Amendment question in that particular case.

When, however, a court truly believes a claimant to be sincere, this factor does not appear to be dispositive. Rather, another factor comes strongly into play: does the judge fear a slippery slope problem or, perhaps more accurately, how does the judge conceive of the slippery slope? Usually the judge envisions some detriment to or even disintegration of society—but the real question becomes who the judge considers responsible. In other words, does the judge blame the religious claimant for contributing to or causing the problem—or does he or she view the government as threatening, even gutting, religious liberty? I will discuss this issue at greater length after providing some discussion of the slippery slope fear as a key motivating factor in judicial decision-making.

C. The slippery slope

The question of whether a slippery slope exists often determines whether or not a court will grant the requested religious exemption. Courts may regard the existence of a slippery slope from two very different points of view, however. Courts taking the first point of view tend to believe that the problem in some way stems from the demands of religious claimants. For those taking this point of view, I contend that courts are most likely to recognize and protect an asserted religious interest when the group 1) is self-contained and relatively isolated from the mainstream of society; and 2) limits its membership and access to the item at issue. I will also argue that unless a group can lay claim to a longstanding religious tradition—in effect, make what amounts to a claim for cultural preservation—courts are likely to deny the requested exemption. In contrast to courts who view the demands of religious claimants as problematic,

some courts take a second, opposing point of view. These courts view the government as the entity that poses a threat—a threat to individual autonomy and the exercise of constitutional rights.

Most of the courts taking the first point of view ask whether the claimants who seek religious license, so to speak, will keep that license limited. To put this another way, courts granting a religious exemption want to be reasonably sure that the group's practice will not spread and infect the rest of society. Will the group control members' access to drugs, for instance, and ensure that they are used only in bona fide religious ceremonies? Will the group enforce particular criteria for membership and ensure that its members are sincere, or will the insincere be able to gain access simply by professing belief? Some courts also worry—or worry even more—that granting one claimant a religious exemption will open the floodgates to a thousand such applications. These courts fear that the capacity of both administrative agencies and the courts will be strained unduly. In short, however they approach the slippery slope question from this first point of view, courts commonly worry that granting one group a religious exemption will mean losing a host of trouble upon society; hence they usually deny the requested exemption.

However, one special concern—a concern for cultural preservation—may come into play, and where the court deems this concern merited it will likely grant the requested religious exemption. The chances that a court will grant an exemption increase as the probability and severity of harm to the culture increases and as the danger that the government will be fooled decreases. Groups who can make this cultural claim typically exhibit the same characteristics as those used by courts to assess the threat that a group's practices will spread. Relevant criteria include the following: 1) the group is a longstanding, but relatively small and culturally distinct group; 2) it is widely recognized as bona fide; 3) little chance exists that just anyone will join it (either because of the religion's strictures or because membership is limited); and 4) the claim pressed involves a practice central to the religion.

Perhaps the classic example of such reasoning, including emphasis on all four factors mentioned above, is *Wisconsin v. Yoder*, a case in which the Burger court held, under the rubric of Free Exercise, that Amish parents were not required to send their children to school beyond the eighth grade.¹⁶⁹ A surprisingly large portion of the court's opinion is devoted to praising the Amish culture and to elaborating its long history in the United States, and the group exhibits each of the four characteristics mentioned above. In an effort to distinguish the Amish from others who might claim a similar exemption, the court wrote that It cannot be overemphasized that we are not dealing with a way of life or a mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.¹⁷⁰ In accepting the Amish's Free Exercise claim, the court also rejected an Establishment Clause challenge:

¹⁶⁹406 U.S. 205, 234 (1972).

¹⁷⁰*Id.* at 235.

The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose.... Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the state's enforcement of a statute generally valid as to others.¹⁷¹

Had the Amish been a new group, virtually unknown and its membership open to anyone who cared to join, or had they pressed a claim that the court found to be peripheral to their religious beliefs, it is not hard to imagine that court would have denied their request for an exemption.

A similar concern for cultural preservation underlies the exemption accorded to the NAC. Courts have emphasized that the NAC has a longstanding tradition of ceremonial peyote use, one in existence long before the government instituted anti-peyote laws. Courts also often speak of the special relationship that the government has to Native Americans, a relationship described by one court as guardian-to-ward¹⁷² and that implicitly extends to the NAC. The court in *Peyote Way Church of God v. Smith* explained this special relationship as follows:

The Congress has a power or duty to the Indians to preserve their dependent nations until such a time as they may become so assimilated so as to not be 'a people apart.' The exercise of power or duty if not over or to Indians as legalistic 'tribes' but as people who have a distinctive culture. Congress in the American Indian Religious Freedom restoration Act has recognized this duty owed. The Federal Government and the State of Texas are furthering this policy by granting an exemption for the use of peyote in the rituals of the Native American Church.¹⁷³

As the court in *Olsen v. DEA* argued, the peyote exemption is bound up with the federal policy of preserving Native American culture, and can be com-

¹⁷¹*Id.*

¹⁷²*See Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991) [hereinafter *Peyote Way IV*].

¹⁷³*Peyote Way Church of God v. Smith*, 566 F. Supp.632, 639 (N.D. Tex. 1983) [hereinafter *Peyote Way I*], *rev'd on other grounds*, *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984) [hereinafter *Peyote Way Church of God II*].

prehended properly only '[i]n light of the *sui generis* legal status of American Indians.¹⁷⁴ Interestingly, all of these comments also have clear overtones of paternalism—a special need to protect or preserve dependent peoples, whom we view as wards.

A significant amount of debate has been engendered by the question of how to interpret comments made during Congressional hearings on the NAC exemption regarding the Church's *sui generis* legal status.¹⁷⁵ Some courts seem to think that this characterization implies that Congress viewed the NAC as unique and only intended the exemption to apply to that Church. Others concede that Congress viewed the NAC as unique at the time the exemption was promulgated—either because the NAC was the only group with a bona fide claim to religious use of peyote or because Congress was unaware of any other qualifying groups—but argue that it did not mean to forever close the door to any other group.¹⁷⁶ Still others seem to think that Congress never intended the exemption to be limited to the NAC, a viewpoint which finds some support in the legislative history. For instance, before deletion by the Senate, H.R. 2 originally contained a *general* clause permitting peyote use in connection with the ceremonies of a bona fide religious organization.¹⁷⁷ Furthermore, the FDA letter to Congressman Harris did not limit its comments to the NAC's use of peyote either.¹⁷⁸ Arguably, the FDA's letter even manifests a belief that the government could *not* constitutionally interfere with a claimant's bona fide ceremonial religious use of peyote, regardless of any Congressional specification on the matter. However hard this debate may be to resolve, it demonstrates that both Congress and administrative agencies unquestionably regarded the NAC as exempt and in fact accorded it special protection by singling it out in the regulation.

Furthermore, courts have invariably mentioned the same factors on

¹⁷⁴878 F.2d 1458, 1464 (D.C. Cir. 1989).

¹⁷⁵See *supra* note 65 and accompanying text.

¹⁷⁶See, e.g., *Peyote Way IV*, 922 F.2d at 1217, in which the court argues that the exemption facially singles out the NAC because the NAC is the only tribal Native American organization of which the government is aware that uses peyote in bona fide religious ceremonies. Although the court believed that a challenge by another Native American peyotist organization could succeed, it was not willing to open the door any further, arguing that it is the government's unique guardian-ward relationship with the Native Americans, dependent sovereign tribes, that renders an exemption for them constitutional. *Id.* at 1216-17.

¹⁷⁷See *supra* note 63 and accompanying text.

¹⁷⁸See *supra* note 64 and accompanying text.

which the Burger court placed emphasis in deciding to grant the Amish a religious exemption from Wisconsin's compulsory-education laws. Several cases have also noted that the NAC's membership is restricted to those who have 25% Native American blood and their spouses, though this assertion was vigorously challenged by Judge Burciaga in *United States v. Boyll*.¹⁷⁹ Whether or not the 25% rule is commonplace, the point remains that courts believe membership to the NAC is limited, either by the 25% rule or by the improbability that people will join the Church just to gain access to peyote; the Church only has about 250,000 members.¹⁸⁰ Peyote use, after all, is tightly controlled by the Church and is permitted only during the meeting, the Church's ceremonial ritual. Furthermore, no one questions the Church's assertion that peyote use is central to the practice of its religion. The Church's long history in this country also sets it apart from movements like the Peyote Way Church of God that have sprung up much more recently—and hence have a much harder time establishing that they are bona fide. Furthermore, as the court's comments, *supra* about a people apart indicate, courts view the NAC as a culturally distinct group.

Contrast this treatment of the NAC with other self-proclaimed sacramental drug users, who have unsuccessfully attempted to obtain the same type of exemption accorded to the NAC. With the single exception of the NAC of New York, each of these groups has failed, and courts have consistently distinguished them from the NAC on the basis of the one or more of the criteria referred to above. Even Peyote Way, founded by a former member of the NAC, has been unsuccessful in its attempts to obtain a religious exemption.

Groups who are not able to make the type of cultural claim available to the NAC face an uphill battle. Courts often forecast a doom and gloom scenario should a religious exemption be granted. The *Leary* court was one of

¹⁷⁹See, e.g., *Peyote Way IV*, 922 F.2d at 1215 for the 25% figure. See *United States v. Boyll*, 774 F. Supp. 1333, 1136 (D.N.M. 1991) for scholarly and lay testimony that only the NAC of North America uses such a racial restriction and that other branches have historically accepted non-Natives into the Church. Judge Burciaga's conclusion in *Boyll* that the racial restriction on membership is not typical of the NAC seems to be based on more thorough research than any other court has undertaken in this area, with the possible exception of the *Thornburgh* case cited *supra*. And there may be an explanation for this seeming discrepancy if courts who have cited the 25% figure were relying on the admission requirements of the NAC of North America, perhaps the most well-known branch of the NAC.

¹⁸⁰*Peyote Way Church of God II*, 742 F.2d at 201.

the first major cases to raise the fear that granting an exemption for religious drug use would nullify our anti-drug statutes and pose an unacceptable level of risk to society. As the court argued, It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.¹⁸¹ The court in *United States v. Kuch* even managed to use the call for individual freedom as a rationale for *denying* a religious exemption, reasoning that If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting breakdown of society.¹⁸² The *Kuch* court seemed to be concerned that granting an exemption would result in widespread usage of marijuana, especially given the Church's policy of admitting anyone who so desired as a member, no matter what you suspect his motives to be.¹⁸³ Allowing Kuch's claim, the court reasoned, would permit anyone to violate the law by paying the Church membership fee. The number of marihuana cases in this court suggests that there are many who would quickly take out a membership and then the [Marihuana Tax] Act would be a nullity.¹⁸⁴

Both courts faced with deciding the question of whether to grant the Ethiopian Zion Coptic Church an exemption, some 15-20 years after *Kuch*, manifested similar concerns. In *United States v. Middleton*, the courts took an even broader view of the slippery slope than did the *Kuch* court, observing that, Extended to its logical conclusion, appellant's argument would protect all drugs, not just marijuana, if any religious group chose to use them as a religious sacrament.¹⁸⁵ The court in *Olsen v. DEA* further forecasted an unreasonably large monitoring burden for the DEA should the exemption be granted. Given that the Church's tenets endorse marijuana use every day throughout the day and that its short history suggested a penchant for lax distribution of marijuana, the court held that even though Olsen's proposal contemplated restricted use, it would not be self-enforcing.... We are unaware of any 'free exercise' precedent for compelling government accommodation of religious practices when that accommodation requires burdensome and constant official supervision and management.¹⁸⁶ Furthermore, the court took this burden for granted, not requiring

¹⁸¹Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967).

¹⁸²United States v. Kuch, 28 F. Supp. 439, 445 (D.D.C. 1968).

¹⁸³*Id.* at 443.

¹⁸⁴*Id.* at 447.

¹⁸⁵United States v. Middleton, 690 F.2d. 820, 825 (11th Cir. 1982).

¹⁸⁶Olsen v. Drug Enforcement Administration, 878 F.2d

the DEA to present actual evidence of the need for supervision, an apparent reversal of the normal allocation of burden of proof under the compelling interest test.

Finally, the slippery slope factor also implicates the fear that granting an exemption for one religious group will open the floodgates for an untold number of me, toos. Courts often fear that granting one exemption will lead other groups to make a similar request, which will not only clog up government agencies and the courts but will also require the courts to continually confront difficult constitutional claims regarding equal protection, establishment of religion, substantive due process, and so forth. The court in *Olsen v. DEA*, for instance, believed that granting one exemption would open the door to others; the court reasoned that either the Equal Protection or the Establishment Clause would appear to command that it [DEA consider requests for exemptions] evenhandedly.... The DEA would have no warrant to contain the exemption to a single church or religion.¹⁸⁷ And after agency consideration, of course, would come further litigation. You might call this an *apres moi, le deluge* mentality.

As long as a court both trusts that a claimant is bona fide and that it is capable of making this determination, its decision will often turn on how it interprets the slippery slope. Where the court views granting an exemption as gutting our laws and opening the door to a veritable flood of claimants, as in *Leary v. United States*¹⁸⁸ and *Olsen v. DEA*,¹⁸⁹ it will almost certainly refuse the exemption. If, however, the court views the slippery slope danger from the opposite perspective—i.e., as granting the *government* too much power over individuals—as in *United States v. Boyll*,¹⁹⁰ it will be more inclined to rule in support of the religious claim.

The Fifth Circuit's opinion in *Leary* typifies that of courts who express a concern that granting a religious exemption will result in the nullification of our anti-drug laws. The court seems to fear that once a single such exemption is granted, anti-marijuana laws would be rendered meaningless.¹⁹¹ Most likely, a good portion of this fear stems from the fact that Leary's use of marijuana did not appear to be circumscribed by anything or anyone other than himself. Although Leary asserted that he used marijuana in connection with his religion, Hinduism, the court was able to show that such use was not essential to the practice of his religion.¹⁹² Not all Hindus use marijuana as a sacrament, and Leary's use did not fit within the confines of a tightly controlled ritual. Rather, he used marijuana whenever and however he saw fit. As such, the

1458, 1462 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 906 (1990).

¹⁸⁷ *Id.* at 1464.

¹⁸⁸ 383 F.2d 851 (5th Cir. 1967).

¹⁸⁹ 878 F.2d 1458 (D.C. Cir. 1989).

¹⁹⁰ 774 F. Supp. 1333 (D.N.M. 1991).

¹⁹¹ *Leary*, 383 F.2d at 861.

¹⁹² *Id.* at 860.

court probably feared that granting him an exemption—even if he would use it responsibly—would open the courts to a wave of similar individualized requests from people who did not have the bona fide interest and impressive academic background¹⁹³—and therefore respect—accorded to Leary.

In *United States v. Boyll*, Judge Burciaga passionately defended religious freedom, but not without having first assured himself of Boyll’s sincerity. To Robert Boyll, the court wrote, peyote is both a sacrament and a deity essential to his religion.¹⁹⁴ Burciaga conducted a meticulous examination of the sincerity of Boyll’s beliefs. In so doing, he undertook significant research into peyotism and the NAC, accepting both scholarly and lay testimony and affidavits tending to show that Boyll had been a member of the NAC since 1981 and that between 1981 and 1989, he participated in peyote ceremonies once every 2-3 weeks.¹⁹⁵ Furthermore, he had both sponsored the ceremonies and been selected by other NAC members to serve as an official during various ceremonies, and he had undertaken a pilgrimage to Mexico, where peyote is harvested; such a journey is considered an act of piety in the NAC.¹⁹⁶ Finally, the court’s research showed—contrary to the government’s assertions—that only the NAC of North America excluded people from membership based on racial criteria; no other branch of the NAC appeared to do so.¹⁹⁷

Convinced of Boyll’s sincerity and of his own capability to make this determination, Burciaga let loose with a judicial opinion that pounded not only the government’s position in this case, but the effect of its war on drugs on religious and other constitutional freedoms. Having berated the government for its arrogance, and having called its attack on religion menacing, Burciaga did not hesitate to conclude that the present prosecution is, at best, an overreaction driven by political passions or, at worst, influenced by religious and racial insensitivity, if not outright hostility.¹⁹⁸ Like most courts, Burciaga feared a slippery slope, but unlike most courts, the slippery slope he saw was one in which citizens’ individual, constitutional rights were being stripped away one by one. He thus had little difficulty in ruling for Boyll, even in—or perhaps *because* of—a climate in which the *Smith* decision had recently been handed down.

IV. CONCLUSION

Judicial decision-making regarding the conflict between religious claims and the enforcement of laws such as the FD&C Act, the Controlled Substances Act, and various other anti-drug regulations and enactments is primarily motivated by one or more of the following factors: paternalism; hostility; and/or fear of embarking upon a slippery slope. For any court to decide in favor of

¹⁹³ *Id.* at 856.

¹⁹⁴ *Boyll*, 774 F. Supp. at 1334.

¹⁹⁵ *Id.* at 1337.

¹⁹⁶ *Id.* at 1337.

¹⁹⁷ *Id.* at 1336.

¹⁹⁸ *Id.* at 1334, 1335, 1342.

a religious claimant, of course, it must first determine whether that claimant is sincere and professes a belief that can accurately be called religious. Even this determination, however, plays a significant role in determining the judge's level of hostility—or lack thereof—toward the claimant. *Bona fides* aside, however, courts also seem to be motivated by paternalistic concerns and, most especially, by their conception of the slippery slope.

Paternalistic attitudes are manifested not only toward the general public, but toward groups that courts conceive of as needing special protection: the ignorant, the gullible, children, even Native Americans. Although important as a factor, however, paternalism does not fully account for courts' decision-making except perhaps for the Scientology import cases. Rather, courts rely most heavily on their conception of the slippery slope in deciding whether to grant a religious exemption. More often than not, the exemption is denied, but this seems to accord with the ratio of 1) courts that view claimants as the source of a variety of problems to 2) those that blame the government for overzealous pursuit of other societal objectives, such as the war on drugs, at the expense of religious freedom. Courts that view claimants' demands as unleashing undesirable consequences typically will not even grant a religious exemption when the claimant is able to demonstrate that its group is self-contained, with limited admission and limited access to the item in question. While these factors, like sincerity, are necessary to granting an exemption, they do not generally appear to be sufficient. Rather, a group must also be able to lay claim to some historical tradition, which needs protection in order to survive. Cultural preservation is therefore key, as evidenced by the experience of the NAC and the Amish, in contrast to the experience of groups like the Peyote Way Church of God. Intriguingly, taken together, these factors suggest that the group most likely to succeed is the one most detached from society at large, making it unlikely that its behavior will somehow rub off on the general public.

In stark contrast to courts that pinpoint claimants as the source of future problems, those that view the government as the agent threatening societal mores are much more likely to grant a requested religious exemption. Such courts are also unlikely to exhibit the type of paternalistic attitudes commonly expressed by judges who cite the need to protect the health and welfare of the ignorant, the unthinking, and the credulous.